Flamingo Las Vegas Operating Company, LLC *and* International Union, Security, Police and Fire Professionals of America (SPFPA) and Chris Rudy.

Caesars Entertainment, Inc. *and* International Union, Security, Police and Fire Professionals of America (SPFPA). Cases 28–CA–077145, 28–CA–078866, 28–CA–079092, and 28–RC–069491

February 12, 2014

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On December 18, 2012, Administrative Law Judge Gerald A. Wacknov issued the attached decision in this consolidated unfair labor practice and representation proceeding. The General Counsel and Charging Party International Union, Security, Police and Fire Professionals of America (SPFPA) (the Union) each filed exceptions and a supporting brief. The Respondent filed answering briefs to the General Counsel's and the Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.[3]

In an earlier case, *Flamingo Las Vegas Operating Co.*, 359 NLRB No. 98 (2013) (hereinafter *Flamingo I*), the Board found that the Respondent committed several unfair labor practices during the Union's campaign to organize the Respondent's security officers. This case is another chapter in that story. Here, we are presented with additional unfair labor practice allegations and several union objections to an election conducted on March 29, 2012.[4] The judge dismissed all the unfair labor practice allegations now before the Board on exceptions and recommended overruling all the objections. For the reasons discussed below, we agree with the judge's findings. However, we find an 8(a)(1) violation that the judge did not address.

I. THE UNFAIR LABOR PRACTICE ALLEGATIONS

A. The Threat to Bizzarro

On April 14, Security Director Eric Golebiewski summoned to his office employee Francis Bizzarro, the primary union proponent. Two other managers were present. The Respondent had received complaints from at least three employees that after the March 29 election, Bizzarro asked those employees how they voted and why. Golebiewski told Bizzarro that he could not harass employees on the casino floor and that if he did not stop, the Respondent would file a charge with the Board. The Respondent never filed a charge.

We agree with the judge, for the reasons he stated, that the Respondent did not violate Section 8(a)(3) and (1) by Golebiewski's statements above. The judge did not consider, however, the General Counsel's additional allegation that Golebiewski's statements independently violated Section 8(a)(1). The General Counsel argued that Golebiewski's statements to Bizzarro constituted the oral promulgation of a rule that unlawfully prohibited employees from engaging in union activity. Although we do not find that the Respondent promulgated a rule because Golebiewski directed his statements solely at Bizzarro and they were never repeated to any other employee as a general requirement,[5] we nonetheless find that Golebiewski's statements were unlawful. Specifically, Golebiewski's threat to file a charge with the Board because of Bizzarro's protected activity had a reasonable tendency to interfere with, restrain, or coerce Bizzarro's exercise of his Section 7 rights, in violation of Section 8(a)(1). See *Postal Service*, 350 NLRB 125,

[1] No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by Golebiewski's threatening employee Christian Alberson with a pay freeze, less leniency in administering discipline, and other unspecified reprisals if employees chose to be represented by the Union or to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by creating an impression of surveillance during that same meeting with Alberson.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order to conform to our findings and the Board's standard remedial language, and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). We shall substitute a new notice to conform to the Order as modified.

[4] All dates are 2012, unless otherwise indicated.

[5] See *Flamingo I*, supra, slip op. at 2 (dismissing allegation that statement directed solely at one employee and communicated to no other employee was an unlawful promulgation of a new rule); *St. Mary's Hospital of Blue Springs*, 346 NLRB 776, 776–777 (2006) (supervisor's comments reprimanding one employee could not reasonably be interpreted as establishing new work rule).

125–126 (2007) (finding unlawful the employer's threat to sue an employee for filing an unfair labor practice charge), enfd. 526 F.3d 729 (11th Cir. 2008); *Sheller-Globe Corp.*, 296 NLRB 116, 116 fn. 3 (1989) (finding unlawful the employer's threat to file an unfair labor practice charge against the union president in an effort to coerce him into signing a severance agreement for unit employees).[6]

B. Rudy's Written Warning

On March 31, while Security Officer Christopher Rudy was posted at the Margaritaville Casino area of the Respondent's facility, a woman reported to him that there was a fight in progress on the street in front of the casino. Rudy walked outside and saw a group of people about 60 yards away, obscuring his view of any altercation. He then stood at the casino's door for at least a minute. A passerby on the other side of the fight had also notified Security Officer Shaqual Starks. Starks responded, moving into the crowd to report the fight to dispatch and to keep bystanders at bay until backup arrived. Meanwhile, another security officer joined Rudy and the two started walking toward the crowd. They began running when dispatch requested immediate backup because Starks was in the middle of the crowd. They and a few other security officers arrived at the same time and began breaking up the fight.

The Respondent's video camera recorded the fight and the actions of Rudy and the other security officers. After reviewing the video at the urging of surveillance office personnel, Supervisor Zeena Minor prepared a written warning for Rudy, stating that Rudy had failed to respond to the fight. Rudy refused to accept the discipline without the involvement of Jack Burgess, security investigations manager and assistant to the director of security. Over the next 2 weeks, Burgess met with Rudy, viewed the video, and spoke with supervisors and employees. During his investigation, Burgess learned that Rudy had testified against the Respondent's interests 2-1/2 weeks before the fight, during the unfair labor practice hearing in *Flamingo I*. Burgess ultimately approved the written warning, which a review board effectively upheld subject to a reduction to a documented coaching if Rudy had no further infractions for 6 months.

We agree with the judge that the Respondent's written warning to Rudy did not violate Section 8(a)(3), (4), and (1). The judge, however, did not apply the Board's analytical framework established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Accordingly, we apply that framework now and do not rely on the judge's legal analysis. Under *Wright Line*, the General Counsel has the initial burden to show that the employee's protected activity was a motivating factor for the adverse action by demonstrating: (1) the employee's protected activity, (2) the respondent's knowledge of that activity, and (3) the respondent's antiunion animus. See *Austal USA, LLC*, 356 NLRB No. 65, slip op. at 1 (2010).[7] The burden then shifts to the respondent to show that it would have taken the same action even in the absence of the employee's protected activity. Id.

We find that the General Counsel made his initial showing that Rudy's testimony at a Board proceeding was a motivating factor for his discipline. Rudy's testimony was protected activity, and Burgess knew about it. In addition, the General Counsel showed antiunion animus in both the timing of the discipline soon after Rudy's testimony and the Respondent's unfair labor practices during the Union's organizing drive, as the Board found in *Flamingo I*, including interrogating employees, soliciting grievances, promising benefits, and creating an impression of surveillance.

We also find, however, that the Respondent showed that it would have issued the written warning even if Rudy had not testified in the earlier hearing. At the hearing in this case, Rudy testified that he acted properly because the Respondent's policies did not permit him to respond to incidents on the sidewalk, respond to incidents without backup, or leave his post without permission. But no other witness corroborated Rudy's description of the Respondent's policies. Ten witnesses—managers, supervisors, and employees—all testified that a security officer in Rudy's position must respond to a fight on the sidewalk, and although officers need backup to break up a fight, even without backup they have a duty to get close enough to the fight to assess the situation and report it to dispatch. Further, witnesses testified that, although officers generally cannot leave their posts without permission, they may do so in emergencies, including

[6] Member Johnson observes that there were no allegations that Bizzarro threatened any of his coworkers, interfered with their work, or contravened any existing work rule.

[7] Member Johnson notes that in a number of cases the Board has alternatively described the animus element of the General Counsel's initial *Wright Line* burden as requiring a showing that "the employer bore animus toward the employee's protected activity." *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 4 (2011). For the reasons fully set forth in his personal footnote statement in *St. Bernard Hospital & Health Care Center*, 360 NLRB No. 12, slip op. at 1 fn. 2 (2013), he finds the quoted description preferable, but he recognizes that the briefer description of the animus element is also consistent with substantial precedent. He finds no need for further comment on this issue until, if ever, the different descriptions support different results in the circumstances of a particular future case. That is certainly not true in the circumstances of this case.

when a fight is in progress. Therefore, Rudy's failure to respond to the fight plainly violated the Respondent's policies, and the Respondent issued the written warning after Burgess's thorough investigation of the incident.

The General Counsel contends that the Respondent did not meet its rebuttal burden because it skipped a level of progressive discipline by giving Rudy a written warning instead of a documented coaching.[8] We reject this argument and find that the Respondent sufficiently explained the enhanced discipline: the Respondent viewed Rudy's inaction as particularly egregious because it could have endangered fellow officer Starks, who was in the middle of the crowd and needed backup. Having found that the Respondent successfully rebutted the General Counsel's initial showing, we dismiss this allegation.

C. Willequer's Discharge

On February 6, the Respondent assigned employee Thomas Willequer to transport casino chips from the cashier's cage to tables needing refills. Willequer admits that he violated the Respondent's policies in two respects that night. First, while in the cashier's cage, Willequer called dispatch at Bill's Gambling Hall, a sister casino where he also worked, to inform them that he would be late for his shift there because he had not yet had lunch. Willequer made that call using his personal cell phone, rather than his work radio, contrary to the Respondent's prohibition on cell phone use while on duty.[9] Second, Willequer miscounted one of his deliveries of chips. Officers assigned to deliver chips must count the chips before leaving the cashier's cage to ensure that the cashier provided the correct amount, but Willequer delivered an extra $500 worth of green chips to a table.

Between September 11, 2010, and July 3, 2011, Willequer had received a documented coaching, a written warning, and two final written warnings for multiple incidents of misconduct.[10] In light of this extensive disciplinary record, Employee Labor Relations Advisor Elma Pagaduan concluded that Willequer's February 6 misconduct warranted discharge as the next step of progressive discipline. Golebiewski approved her recommendation. The Respondent discharged Willequer on February 18.

Although Willequer campaigned for the Union during the first month of the organizing drive (late September to late October 2011), he deliberately kept his activity secret from management and, as the judge found, there is no evidence that the Respondent knew about Willequer's Section 7 activity. Apparently conceding that the Respondent did not discharge Willequer because of his own union activity, the General Counsel argues on exceptions that the Respondent violated Section 8(a)(3) and (1) by discharging Willequer to discourage employees' union activities generally. As more fully explained in *Flamingo I,* Golebiewski had unlawfully threatened 7 to 10 employees at an October 14, 2011 meeting that he would no longer be able to bend the rules concerning discipline if the employees selected the Union as their collective-bargaining representative. Id., slip op. at 13. He had then named Willequer and two other employees as examples of employees who would have lost their jobs had he not saved them with his past flexibility. Id. The General Counsel contends that Willequer was discharged to follow through on the threat of stricter discipline.

Assuming arguendo that the General Counsel made his initial showing that discouraging other employees' union activities was a motivating factor for Willequer's discharge, we find that the Respondent showed that Willequer would have been discharged even in the absence of any union activity. Before February 6, Willequer had received two final written warnings, one more than was provided for in the Respondent's progressive-discipline policy. On February 6, Willequer admittedly engaged in misconduct by using his personal cell phone on duty and miscounting a chip delivery. The record demonstrates that the Respondent has disciplined employees in the past for both infractions. On November 13, 2008, employee Christian Alberson received a documented coaching for using his personal cell phone in a parking garage, and on December 29, 2008, Willequer himself received a documented coaching for a previous $500 chip-delivery mistake. Although both those infractions resulted in more minor discipline than Willequer's February 6 misconduct did, neither disciplinary document indicates that the employee had received prior discipline; in contrast, Willequer had received a second final written warning before his February 6 misconduct. The next step of progressive discipline was separation from employment, which the Respondent imposed.

Our dissenting colleague would find that the Respondent failed to prove that, in the absence of union activity, it would have discharged Willequer, rather than issuing him a third final written warning. He cites particularly the Respondent's previous leniency with Willequer, including issuing a second documented coaching after an

[8] The Respondent's progressive discipline system has four steps: documented coaching, written warning, final written warning, and separation from employment.

[9] The cell-phone policy applied regardless of the work-related nature of Willequer's call.

[10] Willequer was disciplined during that period for failing to notify his supervisors that he arrested someone on the casino floor, socializing with guests in a lounge for an extended period instead of working his post, breaking up a fight before backup arrived, and making profane and antigay comments to a guest.

intervening written warning and granting him a second final written warning prior to termination. Unlike our colleague, we do not find that the Respondent's return to the documented coaching level of discipline, after a gap of over 15 months since the prior warning, negates its application of progressive discipline. Nor do we find determinative the Respondent's failure to prove that it would not have issued a third final written warning to Willequer, in the absence of evidence that any employee had been issued three final written warnings. We find that the Respondent met its rebuttal burden by a preponderance of the evidence, based on its established disciplinary policy and Willequer's disciplinary history. See *Merillat Industries*, 307 NLRB 1301, 1303 (1992) (respondent's rebuttal burden requires only a preponderance of the evidence, and its "defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it"). Accordingly, we dismiss the allegation that Willequer's discharge violated Section 8(a)(3).[11]

II. THE ELECTION OBJECTIONS

The election took place on March 29, following the Union's request to proceed despite the pending unfair labor practice charges. The tally of ballots shows 46 for and 64 against the Union, with 2 challenged ballots, an insufficient number to affect the results. The judge recommended overruling the Union's election objections, and we agree that the objections lack merit, as explained below.[12] Nevertheless, the judge implicitly overruled several objections linked to violations found in *Flamingo I* as involving conduct preceding the Union's November 23, 2011 representation petition, although the record reflects that some of the conduct objected to actually occurred after the petition was filed, i.e., during the critical period.

As to those objections involving prepetition conduct, we agree with the judge that they should be overruled under *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1278 (1961) (only conduct occurring after the petition's filing date may be the subject of an objection). Citing *Parke Coal Co.*, 219 NLRB 546 (1975), the Union argues that the Board should consider the prepetition conduct here in deciding whether to overturn the election. We disagree. In *Parke Coal*, the Board stated that "although the rule in *Ideal Electric* . . . forbids specific reliance upon prepetition conduct as grounds for objecting to an election, such conduct may properly be considered insofar as it lends meaning and dimension to related postpetition conduct." Id. at 547 (considering prepetition promise to provide greater insurance benefits that employer reaffirmed during the critical period), quoting *Stevenson Equipment Co.*, 174 NLRB 865, 866 fn. 1 (1969). Here, the Union merely argues broadly that the prepetition conduct was part of an ongoing antiunion campaign that continued after the Union's petition, rather than showing that the prepetition conduct lends meaning and dimension to related postpetition conduct.[13]

Two of the Union's objections, however, correspond to unfair labor practices, found in *Flamingo I*, that did occur during the critical period. On December 2, 2011, Golebiewski observed Rudy talking to his girlfriend, an employee in a different department, instead of helping two customers who were waiting for him. *Flamingo I*, supra, slip op. at 14–15. Golebiewski approached Rudy and unlawfully threatened to be less lenient with discipline if the employees elected the Union. Id. In mid-January, Bizzarro encountered Assistant General Manager Paul Baker while walking alone from the parking garage, and Baker, in agitation, said that Bizzarro had betrayed him and put Baker's job in jeopardy by trying to unionize the facility. Id., slip op. at 2, 15–16. The Board found that Baker's statement was an accusation of disloyalty and thus an unlawful threat to discharge Bizzarro. Id., slip op. at 2.

Under established Board precedent, "it is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since '[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election.'" *Bon Appetit Management Co.*, 334 NLRB 1042, 1044 (2001) (quoting Clark Equipment Co., 278 NLRB 498, 505 (1986) and Dal-Tex Optical Co., 137 NLRB 1782, 1786 (1962)). But an exception exists "where the misconduct is de minimis: 'such that it is virtually impossible to conclude' that the election outcome has been affected." *Bon Appetit*, 334 NLRB at 1044 (quoting *Sea Breeze Health Care Center*, 331 NLRB 1131, 1133 (2000), and *Super Thrift Markets*, 233 NLRB 409, 409 (1977)). The two unfair labor practices discussed immediately above occurred during the critical period and would normally

[11] We likewise overrule the Union's election objection related to this allegation. Willequer's lawful discharge would not have interfered with employee free choice.

[12] For the reasons stated in his decision, we agree with the judge's recommendation to overrule the objections concerning the Respondent's allowing employees to vote while on duty, the observers' wearing work uniforms, the presence of the Respondent's logo on the tablecloth on the observers' table, and the Respondent's alleged surveillance of Bizzarro.

[13] We also decline the Union's invitation to overrule *Ideal Electric*.

warrant setting aside the election.[14] Here, however, the Union offered no evidence that the critical-period threats were disseminated to any other employees, and the threats affected significantly fewer employees than the 18-vote margin in the election tally. Accordingly, we conclude that the unlawful threats could not have affected the election.[15]

ORDER

The National Labor Relations Board orders that the Respondent, Flamingo Las Vegas Operating Company, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with a pay freeze, less leniency in administering discipline, and other unspecified reprisals if they select the Union as their collective-bargaining representative.

(b) Threatening to file National Labor Relations Board charges against employees for engaging in union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 27, 2011.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for International Union, Security, Police and Fire Professionals of America (SPFPA), and that it is not the exclusive representative of these bargaining unit employees.

Dated, Washington, D.C. February 12, 2014

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN PEARCE, dissenting in part.

Contrary to my colleagues, I would find that the Respondent violated Section 8(a)(3) and (1) by discharging employee Thomas Willequer. Accordingly, I would also sustain the Union's objection concerning that discharge and set aside the election.[1]

The question presented is whether the Respondent unlawfully discharged Willequer to discourage other employees' union activities by using Willequer as an example of earlier threats to be less lenient in administering discipline if employees were to select the Union as their collective-bargaining representative. I would find that

[14] The only other unfair labor practices found here, Golebiewski's unlawful statements to employee Alberson (fn. 1, above) and his threat to file a Board charge against Bizzarro (section I.A., above), occurred outside the critical period.

[15] Compare *Werthan Packaging, Inc.*, 345 NLRB 343, 345 (2005) (declining to set aside an election even though the employer unlawfully threatened to discharge one employee and unlawfully interrogated, at most, five employees, because there was no evidence of dissemination and the union lost by 21 votes), with *Community Action Commission of Fayette County*, 338 NLRB 664, 667 (2002) (setting aside an election where one employee was unlawfully threatened, the threat was disseminated, and one vote was determinative).

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] In ordering a new election, I would also sustain the Union's objections pertaining to Security Director Eric Golebiewski's December 2, 2011 threat to employee Christopher Rudy and Assistant General Manager Paul Baker's mid-January 2012 threat to employee Francis Bizzarro that the Board found unlawful in *Flamingo Las Vegas Operating Co.*, 359 NLRB No. 98 (2013) (hereinafter *Flamingo I*). I agree with my colleagues in all other respects.

the General Counsel made a strong initial showing under *Wright Line*[2] that the unit employees engaged in union activities at the Respondent's facility, the Respondent knew of those activities, and the Respondent demonstrated clear antiunion animus. I would further find the Respondent failed to satisfy its rebuttal burden to show that it would have discharged Willequer even in the absence of union activity.

Although it is undisputed that the employees, including Willequer, participated in union organizing activities at the Respondent's facility, the judge found no evidence that the Respondent was aware of Willequer's involvement in the representation campaign when it discharged him. However, the Respondent acknowledged that it knew of the security officers' union activities as of at least October 7, 2011, and that knowledge was confirmed by the November 23, 2011 petition. In addition, the Respondent's antiunion animus is abundantly revealed in the numerous unfair labor practices that the Board found in *Flamingo I*. There, the Respondent plainly demonstrated hostility toward the employees' Section 7 rights concerning the Union's organizing campaign by interrogating employees, soliciting grievances, promising benefits, and creating an impression of surveillance.

Of particular relevance to Willequer's termination is Security Director Eric Golebiewski's unlawful October 14, 2011 threat to be less lenient with discipline if the employees selected the Union. In conveying that threat, Golebiewski singled out Willequer and two officers who had been absent for health reasons as employees who "would be gone had it not been for [Golebiewski] stepping in and essentially saving their jobs and if a union was present, he wouldn't be able to do that." When Willequer committed additional rules infractions during the organizing campaign, the Respondent had an opportunity to make good on Golebiewski's threat and demonstrate to employees the potential pitfalls of union representation. The timing of Willequer's discharge, only 5 weeks prior to the election, would reasonably enhance its significance to employees and further supports a finding of animus. See *W.E. Carlson Corp.*, 346 NLRB 431, 432–434 (2006) (the General Counsel established compelling prima facie case, despite lack of evidence that employer knew of union activities of employee whose wage increase was withheld, based on employer's statement that wages were frozen during union campaign).

The General Counsel having satisfied the requirements of the prima facie showing, the burden thus shifted to the Respondent to show that it would have discharged Willequer even in the absence of the employees' union activities. Willequer admitted that his use of his cell phone and failure to accurately verify the chip count violate the Respondent's rules. However, the Respondent cannot meet its burden by demonstrating that this misconduct could be a legitimate basis for discharging Willequer; instead, it must show that it would have done so even in the absence of the union activity. *W.E. Carlson*, supra at 433. Crucially for this case, the Respondent had to prove that it would have *discharged* him and not meted out some lesser discipline. See, e.g., *Yellow Ambulance Service*, 342 NLRB 804, 805 (2004) (employer must prove it would have imposed the *same* discipline). The Respondent failed to make this required showing.

Prior to the representation campaign, the Respondent did not uniformly follow its progressive discipline policy and had exercised lenience toward Willequer. Willequer received at least two documented coachings, one in December 2008 for a $500 chip delivery mistake and, after an intervening written warning, another on September 11, 2010 for failing to notify supervision of a detainment or arrest he made on the casino floor. Significantly, he later received two final warnings. Clearly, the Respondent's disciplinary policy did not mandate that it proceed to the next level of discipline or terminate an employee after a single, or even two, "final" written warnings.

At the October 14, 2011 preshift meeting, Golebiewski warned of a change in the enforcement of the disciplinary policy, threatening to be less lenient if the employees voted in the Union. As noted above, he specifically held Willequer out to the other employees as a security officer whom he had "saved" from discharge by applying the rules leniently. Golebiewski reiterated his threat at least two other times during the campaign. On October 27, 2011, as the judge found, the Respondent threatened employee Christian Alberson that "if you guys go union, I can't protect you like I'm protecting you now." And on December 2, 2011, as the Board found in *Flamingo I*, Golebiewski told Rudy that "if this was a union area, I would have to write you up" for talking to his girlfriend, another employee. *Flamingo I*, supra, slip op. at 14–15. The Respondent made no showing to rebut the compelling inference that when it discharged Willequer, it was carrying out its repeated threats to adopt a less lenient approach to discipline. The Respondent offered no evidence to explain why it did not, after the February 6 cellphone and chip-delivery misconduct, show the same lenience to Willequer that it had shown him prior to the union campaign by issuing less severe discipline.[3]

[2] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[3] I note further that the Respondent failed to show that it also disciplined the other employees who had equally miscounted Willequer's

In these circumstances, I would find that the Respondent failed to meet its rebuttal burden. Accordingly, I would find that Willequer's discharge both violated the Act and constituted objectionable conduct warranting a new election.

Dated, Washington, D.C. February 12, 2014

Mark Gaston Pearce, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten to impose a pay freeze, less leniency in administering discipline, or other unspecified reprisals if you select the Union as your collective-bargaining representative.

WE WILL NOT threaten to file National Labor Relations Board charges against you for engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

FLAMINGO LAS VEGAS OPERATING COMPANY, LLC

Larry A. Smith, Esq., for the General Counsel.
John D. McLachlan, Esq. (Fisher & Phillips, LLP), of San Francisco, California, for the Respondent and Employer.
David B. Dornak, Esq. (Fisher & Phillips,LLP), of Las Vegas, Nevada, for the Respondent and Employer.
Scott A. Brooks, Esq. (Gregory, Moore, Jeakle & Brooks, P.C.), of Detroit, Michigan, for the Union.

February 6 chip delivery—that is, the cashier, the pit boss, and the dealer.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Las Vegas, Nevada, on July 31, August 1, 2, 3, 21, and 22, 2012. The charges in Case 28–CA–077145 and Case 28–CA–079092 were filed by International Union, Security, Police and Fire Professionals of America (SPFPA) (Union or Petitioner) on March 22, and April 18, 2012, respectively. The charge in Case 28–CA–078866 was filed by Chris Rudy, an Individual, on April 13, 2012. An Order Consolidating Cases and notice of hearing was issued by the Regional Director for Region 28 of the National Labor Relations Board (Board) on June 15, 2012. The aforementioned charges allege violations by Flamingo Las Vegas Operating Company, LLC (Respondent) of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The petition in Case 28–RC–069491 was filed by the Union on November 23, 2011, after prior petitions filed by the Petitioner on November 4, and 17, 2011, were withdrawn. Following a Representation hearing held on December 20, 2011, the Regional Director for Region 28 of the Board issued a Decision and Direction of Election. The election was scheduled for January 19, 2012, but was postponed on January 17, 2012, pending the investigation and disposition of an unfair labor practice charge in a related case, Case 28–CA–069588.[1] On March 16, 2012, the Union filed a request to proceed with the election and an election was held on March 29, 2012.[2] The tally of ballots shows that there were approximately 123 eligible voters, that 46 votes were cast for the Petitioner, that 64 votes were cast against the Petitioner, that 2 ballots were challenged, and that the challenges were not sufficient in number to affect the results of the election. The Petitioner filed timely objections to the election. On May 16, 2012, the Regional Director issued an order directing hearing on objections. The hearing on objections has been consolidated with the unfair labor practice matters for determination.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the Acting General Counsel (the General Counsel), counsel for the Respondent, and counsel for the Union/Petitioner. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

[1] This case is currently pending before the Board following an unfair labor practice hearing on March 13–16, 2012, before Administrative Law Judge Gregory Meyerson, and a decision issued by Judge Meyerson dated June 25, 2012.

[2] The collective-bargaining unit consists of all full-time and regular part-time security officers performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act employed by Caesars Entertainment, Inc., at its Flamingo, O'Sheas, and Bill's Gambling Hall facilities in Las Vegas.

FINDINGS OF FACT

I. JURISDICTION

The Employer, Caesars Entertainment, Inc., is the Respondent's parent corporation. The Respondent is a limited liability company with an office and place of business in Las Vegas, Nevada, where it is engaged in the operation of a hotel and casino. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of $500,000, and purchases and receives goods at the Respondent's Nevada facility valued in excess of $50,000 directly from points outside the State of Nevada. It is admitted and I find that both the Employer and the Respondent are, and at all material times have been, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues are whether the Respondent, during the course of a union organizational campaign among its security officers, violated Section 8(a)(1), (3), and (4) of the Act by suspending and discharging employees because of their union activity, and by threatening employees with various repercussions if they selected the Union as their collective-bargaining representative.

B. Facts and Analysis

The Union has been engaged in organizing efforts among the Respondent's security officers who perform duties at several adjacent properties owned and operated by the Respondent or the Respondent's parent company, Caesars Entertainment, Inc. As noted, the Union/Petitioner filed a representation petition on November 23, 2011, and an election was held on March 29, 2012.

On October 14, 2011, during the organizational campaign but prior to the filing of a representation petition by the Union, the Respondent's security director, Eric Golebiewski, held a preshift meeting with a group of some seven or eight security officers before they were scheduled to go on duty that night on the graveyard shift. The meeting lasted some 4 hours because of the give-and-take at the meeting, during which Golebiewski and the Union's chief proponent, Officer Francis Bizzarro, spoke back and forth "the majority of the time" as Bizzarro presented his concerns and advocated the need for union representation. The meeting came to be referenced by both the Respondent and the employees as the "four-hour meeting." While certain remarks made at this meeting by Golebiewski are the subject of the aforementioned unfair labor practice matter currently pending before the Board, and are not alleged herein as being violative of the Act, these remarks, infra, are germane to this matter as background.

Bizzarro, a current employee, testified that he contacted the Union, obtained authorization cards, literature, and brochures, and began passing these items out to other security officers on the graveyard shift. He gave some cards to Officer Thomas Willequer, who also, according to Bizzarro, helped him distribute these materials to security officers at Bills Gambling Hall, an adjacent casino also operated by the Respondent or the Respondent's parent company. Bizzarro testified that while a number of other security officers assisted him in union organizing, he was the main person the unit employees would approach if they had questions about authorization cards. Shortly after he began passing out the cards, a flyer appeared with a photo of one of the cards, urging the employees not to sign it.

Bizzarro testified that during the aforementioned 4-hour meeting, "we went back and forth with . . . heated discussion" about management, the officers and the Union. During the course of the discussion Golebiewski said to three of the security officers present, namely, Thomas Willequer, Brian Meadows, and Steve Fox,

> . . . that if a union came in that he wouldn't be able to bend the rules for them, that with the union present, that there would be no flexibility and everything would be by the book and he wouldn't be able to use any of his influence to keep from terminating some of the officers. He pointed at Brian and Thomas and Steven and said that they would be gone had it not been for him stepping in and essentially saving their jobs and if a union was present, he wouldn't be able to do that.
>
> . . . .
>
> . . . that Thomas [Willequer] had violations, company violations that would have ended, would have resulted in his termination had he not given him a more than a second or third chance and Brian Meadows had been ill and had run out of his FMLA, his vacation, or his sick time, and that Eric [Golebiewski] allowed him to continue to work and extend that, when he should have been terminated for absenteeism and same thing with Steve Fox, due to his health conditions . . . that he would have been terminated, as well.

Golebiewski testified that on October 7, 2011, he first became aware of the union organizing activity and was also advised that Bizzarro was the main organizer for the Union. Golebiewski, during his testimony, denied that he made the aforementioned statements attributed to him by Bizzarro during the 4-hour meeting, and simply answered "no" when asked whether he made "any suggestion to employees that if a union were in the picture in any respect, that [he] would not be able to make exceptions to discipline for them."[3] Golebiewski testified that Bizzarro spoke and presented his grievances and viewpoints during some 60 to 70 percent of the meeting, and that, although Golebiewski had no initial intention of holding such a lengthy meeting, he felt obligated to respond to all of the ques-

[3] Bizzarro, a current employee, appeared to be a forthright witness with a detailed recollection of the meeting. Another security officer, Thomas Willequer, who attended the meeting, testified similarly, infra. Further, still another security officer, Christian Alberson, during a separate one-on-one conversation with Golebiewski testified that Golebiewski made similar comments during that conversation, infra. I credit the testimony of Bizzarro, Willequer, and Alberson over the abbreviated disclaimer of Golebiewski.

tions and concerns; he did not want to walk out before all the questions were answered as he believed this would give the wrong impression. Golebiewski conducted meetings with other shifts as well during the same week, but other employees did not express the concerns or present the issues that Bizzarro presented, and the other meetings were significantly shorter.

Bizzarro testified that on about April 14, 2012, following the March 29, 2012 election, he was summoned to Golebiewski's office. Security Shift Manager Charles Willis and Security Shift Manager Cedric Johnson were also present. Golebiewski, according to Bizzarro, pointed at him and said that he had received several complaints from security officers that he had been asking them "which way they voted during the vote and that this was a direct violation of the National Labor Relations Board and that I should consider this my warning." Golebiewski said, according to Bizzarro, that the security officers reported that Bizzarro had told them "there was a list and the Union had a list and knew which way they voted." Bizzarro did not respond. Bizzarro asked if there was anything for him to sign, and Golebiewski said no. Bizzarro asked if he could leave and go back to work, and he left the room. The meeting lasted approximately 45 seconds to a minute. Bizzarro was not given a written warning.

Willis testified that after the election three security guards complained to him about Bizzarro, and he, in turn, so advised Golebiewski. Willis testified:

> I don't remember the exact set of complaints, but it was generally that they were being asked how they voted and why, if they voted no, why would they vote no, why would they do that to him, because he's trying to protect them and their jobs.

Both Golebiewski and Willis testified that Bizzarro was called into the office and told that security officers were complaining about Bizzarro harassing them, during shift times and in work areas, about how they voted in the election. Golebiewski testified that he told Bizzarro, "You can't harass these guys on the casino floor." Willis testified that Golebiewski said, "that if it continued then, we'd be seeking an NLRB complaint against [Bizzarro]."

I credit the testimony of Golebiewski and Willis, and do not credit Bizzarro's account of the conversation to the extent it differs from that of Golebiewski and Willis. I find that Bizzarro was not, contrary to the complaint allegation, "disciplined" for engaging in union activity. Nor was Bizzarro told that he would be disciplined if he continued to engage in such conduct. Rather Bizzarro was told that if he continued to engage in the conduct that the Respondent believed was impermissible and about which employees had complained, namely harassing employees about how they voted, then the Respondent would seek a resolution of the matter before the NLRB. I shall dismiss this allegation of the complaint.

The complaint alleges that the Respondent disciplined employee Chris Rudy on April 13, 2012, because he engaged in concerted activities on behalf of the Union and gave testimony to the Board in the form of an affidavit and testified at a prior board hearing, held on March 13–16, 2012, in the aforementioned related unfair labor practice proceeding now pending before the Board.

Rudy began working for the Respondent as a security officer on August 2, 2010. There is no record evidence that Rudy engaged in activities on behalf of the Union. Rudy testified before an administrative law judge in the prior proceeding and his affidavit was shared with the Respondent at the hearing.

On March 31, 2012, 2 days after the aforementioned March 29, 2012 election, Rudy was on duty inside the doors of one of the Respondent's three adjoining properties, each with separate entrances fronting on Las Vegas Boulevard, also referred to as the "Strip." A patron approached him and advised him that there was a fight on the Strip. Officer Rudy walked outside the doors to investigate, and simultaneously reported on his radio to the dispatcher, Officer Keith Bash, a nonsupervisory security officer, that there was a fight on the Strip. Rudy looked down the sidewalk some 150 feet and observed a group of pedestrians with their backs to him. Rudy testified that the group of people "were looking at something. They had their backs to me, so they were looking at something over there. I couldn't tell what they were looking at." He did nothing further until "about a minute later" when another security officer, Deborah Allen, joined him and the two began walking toward the group of people. They got about halfway there when they heard on the radio that "we needed people to respond immediately to this fight, that we had Officer Starks in the middle of it by herself."[4]

While Rudy was able to see a group of people from his vantage point, he was not able to see any fight taking place; nor was he able to see Starks, as the group of pedestrians who were observing the fight blocked his view. The fight was between two individuals who were scuffling and had their torsos extended over a railing that separated the sidewalk from the street. Starks, who had called dispatch on her cell phone for assistance as her radio battery had been depleted, was close to the combatants appropriately observing the fight but, in accordance with protocol, was not attempting break it up until additional security officers arrived at the scene. A number of security officers, including Rudy, arrived at the same time and broke up the fight.[5]

About an hour after the incident Rudy was called to the office and asked by Security Shift Supervisor Zina Minor why he had not immediately backed up Starks. Rudy said he didn't know Starks was there, and Minor and Rudy disagreed about whether Rudy was in a position to observe Starks. After further investigation, Rudy was issued a written warning by Minor on April 13, 2012, as follows:

> On Saturday March 31st, 2012 Security Dispatch radioed that there was a fight in front of Margaritaville on the west side walk. Officer Starks stated that she was en route. Upon Starks arriving at the scene, her radio went out and she used her cell phone to call for back up. Officer Bash in dispatch got on the radio and stated that Officer Starks needed back up. During the interview, Officer Rudy stated that a guest came up to him and advised him that there was a fight outside on the west side

[4] The scenario was well documented as a security video, introduced into evidence, captured the event as it transpired.

[5] The scenario was captured by the Respondent's surveillance camera and the video was introduced in evidence in this proceeding.

> walk. Officer Rudy is observed [in the video] coming out of Margaritaville doors, standing on the stairs, and looking down the west side walk towards the altercation.
>
> Full participation in an incident of this nature is needed to provide protection for guest (sic) walking on the side walk as well employees (sic) involved. Maximum involvement of all personnel assisting with the altercation. Expediting the detainment which helps minimize injuries to both suspects and the employees involved.
>
> Officer was advised that he is to take an active role during incidents including being proactive and physically provide assistance and back up when suspects are fighting.

Rudy, who had received no prior warnings of any kind, believed the written warning was incorrect and unwarranted and requested in writing on April 13, 2012, that a board of review panel remove the written warning from his file. The board of review process is established by the Respondent to give employees the opportunity to overturn or modify disciplinary action. The review board met on May 16, 2012. Rudy called Bash, the on-duty dispatcher during the aforementioned incident, and Allen, who had accompanied him to the scene of the fight, as witnesses on his behalf. Rudy was not in the room at the time these individuals appeared before the review board.

The review board decided to modify the prior written warning as follows:

> Written warning to be reduced to verbal if no other disciplinary action occurs within six months.

Officer Bash, called as a witness by the General Counsel, testified that officers are to "respond" to fights or other misconduct on the public sidewalk in front of the Respondent's properties because, "Fights in front of the Flamingo makes the Flamingo look bad, so we try and just, by our presence, hopefully they will break up the fight." Further, there is an obligation to "observe and report," that is, according to Bash, "get a good description" of the incident, and report what you observe to dispatch. Finally, with appropriate reinforcement, officers are to "engage," that is, attempt to physically break up the altercation, but only when there are at least two security officers for each person involved in the fight. I discount Bash's testimony that Rudy was appropriately "Observing and reporting because he was looking at the group of people milling around and then he was calling over the radio what he saw," and was not obligated to do more "because all he saw was a group of people milling around. . . ." Thus, Rudy had been advised of a fight by a patron, and when he looked down the sidewalk he observed a group of people who were focused on something. It would have been reasonable for Rudy to assume, under the circumstances, that they were watching a fight in progress. Rudy, however, did not immediately respond and place himself in a position to "observe and report," that is, to determine whether, in fact, the fight was ongoing and the nature of the fight, for example, how many individuals were involved or the extent of injuries, and other related observations.

On the basis of the foregoing, I find the General Counsel has failed to show by a preponderance of the evidence that the written warning to Rudy was in retaliation for his participation in the Board hearing. The Respondent's position seems reasonable under the circumstances, namely, as noted in Rudy's aforementioned written warning, officers are "to take an active role during incidents including being proactive and physically provide assistance and back up when suspects are fighting." Thus, the Respondent could reasonably conclude that after learning of a fight, simply observing and reporting that you are watching a group of people watching something, without immediately approaching to observe the situation firsthand, was not a sufficiently proactive response. As Bash testified, "by our presence, hopefully they [the participants] will break up the fight." I shall dismiss this allegation of the complaint.

The complaint alleges that Thomas Willequer was unlawfully terminated on February 21, 2012, in violation of Section 8(a)(1) and (3) of the Act.

Willequer was suspended pending investigation on February 9, 2012, for an incident that happened on February 6, 2012, namely, according to Respondent's records, "using your personal cell phone while doing a fill resulting in a $500 variance."

Willequer began working for the Respondent as a security officer in 2008. Willequer testified that during the union organizing drive he helped pass out union "information" cards and answered officers' questions about the Union. Apparently, the cards he handed out were not returned to him, as he stated they were to be filled out by the security officers, who would then send them in to the Union to get information. He distributed these cards to some 10 to 15 individuals and talked about the union to many of his co-workers on the night shift. Willequer testified that, "Mostly it was them approaching me throughout the night," before, during and sometimes after his shift, as "in previous times" employees had voiced their concerns against the Union, and he did not want to disrespect them by "pushing" the Union. His union activity continued for about a month, from late September 2011, until the end of October 2011. During this period there was robust discussion about the Union. Some security officers were outspoken about being for and some were outspoken about being opposed to the Union. At about the end of October 2011, according to Willequer, "Everybody was sick of hearing about the Union, they just wanted to be done with it." Willequer acknowledged that he was very careful with respect to the union activities he engaged in "to be sure that management didn't find about them." His cause for concern was that he was on a final written warning from July 3, 2011, and that made him particularly cautious.

Willequer had received the following disciplinary warnings:

- Documented Coaching on September 11, 2010 for failing to notify supervision of a detainment or arrest he made on the casino floor.
- Written Warning on October 12, 2010 for sitting down in the lounge for an extended period of time talking with guests rather than working his assigned post.
- Final Written Warning on November 21, 2010 for putting himself in harms way by engaging in a melee involving a fight between patrons prior to backup arriving on the scene.

- Final Written Warning on July 3, 2011 for making offensive comments to a guest including profanity and references to the guest's sexual preferences. The warning states, "You admitted at your interview and in your statement that you used profanity and made remarks regarding sexual preference."

Willequer testified that he and Officer Brian Meadows were used as examples by Director of Security Golebiewski at the aforementioned October 14, 2011 4-hour meeting, attended by, according to Willequer, some 7 to 15 security officers. Golebiewski said, according to Willequer, that if the Union "was here" he could not guarantee he would be able to save our jobs or "have a say in it." He went around the room individually asking everybody why would we want the Union. He specifically referenced Willequer's prior write-ups and said "something along the lines of if the Union was in there and the amount of write-ups that I had, he . . . wasn't sure that . . . that he would be able to save my job."

The duties of security officers include insuring the accuracy of chip fills. Chips are electronically ordered from the cashier's cage by the pit boss, placed in a chip rack by the cashier, checked for accuracy by the security officer performing the fill operation, and placed in a see-through container that is videotaped and then delivered by the security officer to the casino table where both the dealer and pit boss sign off on the delivery. Sometimes, according to Willequer, security officers will deliver 30 to 60 chip fills per hour. He acknowledged that the proper count of the chips is "very important to the casino."

The Respondent maintains that Willequer was discharged in accordance with its progressive disciplinary policy, infra, because his chip fill was short and he was on his personal cell phone while on duty in the cage area. When Willequer was first confronted with these accusations during the Respondent's investigation of the matter, he denied both allegations, saying that he had not been on the phone and that he had double-checked the fill count on the chips to make sure it was correct. Later, however, Willequer acknowledged that in fact he had used his cell phone at the cashier's cage and that the rack of chips he delivered to the table was incorrect; thus, there were supposed to be $1000 in green chips but instead there were $1500 in green chips. Neither the dealer nor the pit boss caught the mistake.

During the Respondent's investigation of this matter, Willequer furnished his cell phone records which show that he made two phone calls on his cell phone, both to the same individual at Bills Gambling Hall control office. Bills Gambling Hall is another casino adjacent to the Flamingo, and is owned and operated by the Respondent or the Respondent's parent corporation. Some security officers, including Willequer, work at both casinos, and Willequer phoned an individual at Bills Gambling Hall on the night in question to let him know he would be late relieving him for that particular post because he had been busy at the Flamingo and had been unable to take a lunch break; therefore, he would be taking his lunchbreak before reporting for duty at Bills. This was a business call, and not a personal call. Willequer testified he knew it was against policy to use his cell phone instead of his radio for such a call, but did not want to tie up the radio with "personal matters." However, Willequer acknowledged that similar conversations regarding lunchbreaks or other such matters are conducted by security officers over the radio "all the time." During the Respondent's investigation of the matter, Willequer told the investigating labor relations advisor, Elma Pagaduan, infra, that:

> I was thinking about using the radio, but because it's more personal to talk to someone over the phone instead of using the radio, I didn't want the other officers to know what's going on because everyone can hear over the radio. I wanted to have a one-on-one conversation, not 15 to 1 conversation.

Willequer testified that although security officers are not permitted to use their cell phones while on duty, he has seen other security officers do this at least three or four times a night, and that in order to avoid being caught," usually they duck in by the elevator areas to talk . . . trying to hide in certain sections . . where coverage is the poorest so that they're not seen on the camera."

Elma Pagaduan is the Respondent's employee labor relations advisor. She conducted an investigation into Willequer's February 9, 2012 suspension pending investigation (SPI) which is issued to an employee who, as a result of the Respondent's progressive disciplinary policy, is subject to termination as the next step in the process. She interviewed Willequer on February 13, 2012. During the course of the interview, according to Willequer, Pagaduan mentioned that the investigative procedure would have been different if a union had represented the security officers.[6] While Pagaduan did not recall making such a statement, she indicated that she might have done so.[7] Pagaduan testified that cell phones are to be used only on breaks in designated break areas, and that Willequer admitted he knew the cell phone policy; however, he didn't want to use the radio to call Bills dispatch to notify Officer Maranucci that he would be late in relieving him because he wanted it to be a one-on-one call. Pagaduan, during her investigation, also spoke to Maranucci, who confirmed that Willequer had called to tell him he was running late to break him at Bills. As noted above, Willequer submitted cell phone records showing that he had made two calls to Maranucci during his shift.[8] Pagaduan testified that Willequer also admitted that he had signed for and delivered an incorrect fill.

Upon completing her investigation, and reviewing Willequer's personnel file, including the aforementioned disci-

[6] In this regard, Willequer's affidavit states: "During this conversation, the representative did mention something about the fact that if security guards had been represented by a union, that I would have had a union representative present for the interview and that the process would be a whole different process."

[7] Pagaduan's extensive notes of her interview with Willequer show that at the end of the interview she told him he would be remaining under suspension until a decision had been made, and "I explained the Board of Review process to Thomas. He said that he did not know about this and no one had ever explained this to him. Now he knows." There is no evidence that Willequer appealed his discharge by asking for a Board of Review determination.

[8] The record does not contain information regarding the nature of the first call, or why Willequer called Maranucci twice.

plinary warnings issued to Willequer, Pagaduan reached the conclusion he should be terminated. She made her recommendation to Golebiewski, who concurred. Pagaduan testified she did not know whether Willequer had supported the Union.[9]

As noted above, Willequer acknowledged that he was very careful with respect to the union activities he engaged in "to be sure that management didn't find about them," because of the fact that he had been issued a previous final written warning. There is no evidence that the Respondent was aware of his union activity prior to his discharge. He apparently discontinued such union activities in late October 2011, and from that time until his discharge, over 3 months later, he refrained from engaging in union activity. The General Counsel maintains that the fact that both Bizzarro, whom Golebiewski knew to be the chief union adherent, and Willequer were present at the October 14, 2011 4-hour meeting and that Golebiewski singled out Willequer, among others, as an example of his lenient policy in protecting the jobs of security officers,[10] is evidence of Golebiewski's knowledge or suspicion that Willequer, too, was a union adherent. There is no evidence to support this supposition. Rather, Willequer was present at the meeting because he happened to be on the same shift as Bizzarro and, insofar as the record shows, was simply singled out by Golebiewski as a convenient example rather than because Golebiewski believed him to be a union adherent. I shall dismiss this allegation of the complaint.

The complaint alleges and the General Counsel argues that the Respondent committed various 8(a)(1) violations during a one-on-one meeting between Officer Christian Alberson and Golebiewski on or about October 27, 2011.

Alberson was employed as a security officer by the Respondent from September 11, 1998, until his discharge on November 17, 2011. His discharge is not in question. Alberson testified that Golebiewski called him in his office as Alberson happened to be walking past one day,[11] asked him to sit down, offered him a "Monster" energy drink, asked Alberson about his kids and then began talking about the Union. He said he didn't think it was a smart idea "for you guys to do it." He said he couldn't speak directly about the Union but he wanted to express his concerns. He told Alberson to read all the "paperwork" from whoever was distributing the materials, and 'think about everything." He told Alberson to think about what happened at Caesars Palace across the street and said, "Look at the dealers that were over there. They got a freeze in pay for four years and they haven't gotten a raise . . . do you want that?" Albertson said no. Golebiewski said that he had brought him back to work after his suspension and "I just want you to know, if you guys go union, I can't protect you like I'm protecting you now . . . you'll be unsafe and I won't be able to take care of you at that point." He again asked, "Do you want that?" Alberson said no. Golebiewski repeated that Alberson should read everything because "he wants the best interests for us and he doesn't want anything bad to happen to us if we go union." Then they spoke about "life and family and stuff like that."

Golebiewski denied that this conversation ever occurred.

I credit the testimony of Alberson, who appeared to be a credible witness with a vivid recollection of the conversation. Alberson's testimony is consistent with the testimony of other employees who testified to similar comments by Golebiewski at the 4-hour meeting. Moreover, I have previously discredited Golebiewski's testimony that he made no such comments at the 4-hour meeting.

I find that Golebiewski's warnings about a freeze in pay, his inability to afford employees protection from suspensions or discharges, and other similar unspecified adverse consequences resulting from selecting the Union as the employees' collective-bargaining representative, is violative of Section 8(a)(1) of the Act as alleged.[12]

IV. THE ELECTION OBJECTIONS

As noted, the petition in Case 28–RC–069491 was filed by the Union on November 23, 2011, after prior petitions filed by the Petitioner on November 4, and 17, 2011, were withdrawn. The election was held on March 29, 2012, and the Petitioner filed timely objections to the election. Many of the election objections track the allegations in the instant unfair labor practice proceeding as well as the allegations in the aforementioned unfair labor practice proceeding now pending before the Board on the Respondent's exceptions to the decision of the administrative law judge.

The only alleged unfair labor practice in this proceeding that occurred after the filing of any of the three petitions is the alleged unlawful discharge of Willequer on February 21, 2012. The Petitioner included Willequer's discharge as an election objection. As noted, I have dismissed that allegation of the complaint, and therefore I find that Willequer's discharge does not constitute objectionable conduct.

The Petitioner further objects to the election as follows:

- The Employer offered and/or granted employees breaks to vote while on duty.

Prior to the election, by letter to the Regional Office dated January 4, 2012, the Petitioner objected to the Employer's unilateral decision to permit employees to vote while on duty. The Regional Office deferred this matter to the election objection stage of the proceeding. During the day of the election the employees were permitted to vote any time the polls were open,[13] either before, during, or after their shift. If they wanted to vote while on duty they were required to radio the dispatcher to obtain permission to leave their post in order to vote. The Petitioner would apparently characterize this procedure as the

[9] Pagaduan appeared to be a credible witness.

[10] There is no complaint allegation that Golebiewski, and thereby the Respondent, changed his leniency policy vis-à-vis Willequer in order to influence the result of the upcoming election.

[11] While the date of the conversation is uncertain, it is clear that, if in fact there was such a conversation, it occurred after October 7, 2011, when Golebiewski first found out about the Union. Accordingly, it occurred within the 10(b) period and is not time-barred, as contended by the Respondent.

[12] I do not find that Golebiewski's remarks during this conversation also created the impression of surveillance of employees' union activity, as alleged, and I shall dismiss this allegation.

[13] The official notice of election, posted at the Respondent's premises, states, inter alia, "EMPLOYEES ARE FREE TO VOTE AT ANY TIME THE POLLS ARE OPEN."

granting of an extra break. The Petitioner relies upon *Rivers Casino*, 356 NLRB No. 142 (2011), as authority for its objection, maintaining that, as the Board stated in *Rivers Casino*, the extra break constituted an "impermissible impact on employee free choice." The cited case is inapposite. Thus, in *Rivers Casino*, graveyard shift employees were given an extra break to vote in contravention of a prior written agreement between the union and employer, which specified that employees could vote "during working time if on a regularly scheduled break." The Board emphasized its rationale as follows:

> Here, where the parties had entered into a well-publicized agreement specifying that employees were to vote during their breaktime, the graveyard-shift employees would have understood that they had been given an extra break on election day solely as a matter of the Employer's beneficence and discretion and that the break was intended to facilitate their voting. Thus, right before the employees cast their ballots, the Employer's action unfairly signaled it['s] authority to grant and thus to take away benefits. . . .

Moreover, in the instant case, the dispatcher(s) who granted employees permission to vote, depending upon whether there was sufficient security coverage to permit them to leave their post, were not supervisors; rather, they were also unit employees eligible to vote. Further, there is no showing that any employee who wanted to vote was unable to do so.

I recommend that this objection be overruled.

The Petitioner further objects to the election as follows:

- The Employer's observers wore Employer insignia.
- The Employer's observers wore Employer uniforms.
- The table cloth and/or skirt behind which the NLRB Agents and observers sat and employees checked in to vote was adorned with Employer insignia.

The Employer's election observers during the three scheduled voting sessions on the day of the election were unit employees. Because they were scheduled to work that day, each wore the customary uniform that security offices are required to wear while on duty, including "Security Officer" patches on the sleeves and fronts of their shirts, bearing the name of the particular casino where they work. The election was conducted in a conference room at the Employer's premises. The table at which the observers and Board agents sat was covered by a dark table cloth, with a Caesars Entertainment logo and the wording "CAESARS ENTERTAINMENT" on the front skirt of the table cloth.

The Petitioner maintains that the prominent display of the Employer's name and logo on the table cloth, coupled with the uniforms worn by the Employer's election observers, constituted electioneering at the polling place and, in addition, could impermissibly "lead voters to believe that the Employer was in control of the process, not the NLRB."

It was permissible for the observers to wear their customary uniforms. NLRB Casehandling Manual, Part Two, Representation Proceedings, at Section 11310.4, headed "Observer Identification" is as follows:

> The official badge to be worn by observers is the one provided by the Board. It is preferred, although not required, that no other insignia be worn or exhibited by the observers during their service as observers. This, of course, does not apply to regular employer identification badges, the wearing of which is required by the employer.

Further, while it would have been preferable for the Board agent(s) to remove the table cloth or require the Employer to do so in order to preserve, insofar as possible, the neutrality of the voting place, it is highly unlikely that the table cloth would have any effect on the voters' free choice. I recommend that the foregoing objection, singly and collectively, be overruled.

The Petitioner further objects to the election as follows:

- The employer conducted surveillance on employees who supported the Union.

The petitioner maintains that the Employer engaged in surveillance of the protected concerted activities of Officer Bizzarro on several occasions, namely, on November 28, 2011, and in February 2012.[14] While the record evidence contains emails to and from Respondent's managers regarding Bizzarro's activities or comments, there is no showing that any clandestine surveillance took place. Moreover, there is no evidence that either Bizzarro or any unit employees were aware of the existence of these emails. Regarding the contention that in February 2012, two employees were asked by the Employer to prepare a written statement concerning Bizzarro's prounion activities, the evidence shows that the two employees in question approached supervisors to complain that Bizzarro kept approaching them about the Union. One employee states in his written statement, inter alia, "I don't want to hear about the Union anymore!" The other employee states, inter alia, "After being approached numerous times, I would like these actions to stop."

I recommend that this objection be overruled. There is no evidence that the employees were aware of the emails, and therefore the emails could have had no impact on the election results. The fact that the two complaining employees who approached supervisors with their concerns were asked to submit written supporting statements, would not have reasonably caused them to believe, under the circumstances, that the Employer was keeping Bizzarro's activities under surveillance.

The Petitioner further objects to the election with additional objections that predate the filing of the representation petition, maintaining that certain conduct of the Employer, including the alleged unfair labor practices in the collateral unfair labor practice proceeding, also constitute objectionable conduct. The Board, in *Ideal Electric*, 134 NLRB 1275 (1961), established the policy that the date of the filing of the petition is the cutoff time in considering alleged objectionable conduct. The Petitioner has not demonstrated that the prepetition conduct herein

[14] While the Petitioner also asserts, as a component of this objection, that Security Director Golebiewski wrote a lengthy memo advising high-level managers of Bizzarro's comments and concerns at the October 14, 2011 4-hour meeting, this conduct by Golebiewski was prepetition. In addition, memorializing the comment of an employee at an open meeting is not "surveillance" as commonly understood.

falls within any exception to the *Ideal Electric* policy. See, e.g., *Ron Tirapelli Ford v. NLRB,* 987F.2d 433, 443 (7th Cir. 1993); *Parke Coal Co.,* 219 NLRB 546 (1975). Accordingly, I recommend that the remainder of the Petitioner's objections be overruled.

On the basis of the foregoing, I further recommend that the Petitioner's election objections be overruled in their entirety and that the results of the election be certified.

CONCLUSIONS OF LAW AND RECOMMENDATIONS

1. The Respondent and Employer are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent has violated Section 8(a)(1) of the Act as found herein.

THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(1) of the Act, I recommend that the Respondent be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Finally, I shall recommend the posting of an appropriate notice, attached hereto as "Appendix."

The Election Objections

It is recommended that the Petitioner's election objections be overruled in their entirety and that the results of the election be certified.

ORDER[15]

The Respondent, Flamingo Las Vegas Operating Company, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning or threatening employees regarding a freeze in pay, or the inability to afford them protection from suspensions or discharges, or other unspecified adverse consequences that would result from selecting the Union as the employees' collective-bargaining representative.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act.

(a) Within 14 days after service by the Region, post at its Las Vegas facilities involved in this matter copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative(s), shall be posted immediately upon receipt thereof, and shall remain posted by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 21 days after service by the Regional Office, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: December 18, 2012

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT warn or threaten you with a wage freeze in the event you select the Union as your collective-bargaining representative.

WE WILL NOT warn or threaten you that we will be unable to protect you from suspension or discharge in the event you select the Union as your collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

FLAMINGO LAS VEGAS OPERATING CO., LLC

[15] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of the United States Court of Appeals, the wording in the notice reading, "Posted by Order of the National Labor Relations Board," shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."